In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 149

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY AND WEST COAST NEWS COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners in this obscenity prosecution requested that the trial court, as part of its definition of what materials are "obscene," instruct the jury as follows (Pet. 16; Appendix to Appellants' Brief in the court of appeals, Vol. IV, p. 664a):

> A writing may not be deemed obscene unless it is utterly without redeeming social importance. In other words, the Constitution protects all material relating to sex except that which is totally devoid of social importance. The word 'redeeming' in the context herein refers not to a balancing of the alleged pruriency against the social importance of the ma-

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terial, but rather to the presence of matters of social importance in the content which gains for the material its position as constitutionally protected utterance. The jury will therefore keep in mind that in addition to the standards for judging obscenity, heretofore defined, no writing can be found to be obscene unless the writing is also utterly without redeeming social importance as the Court has defined it.

The trial court declined to give this instruction, deeming it "an incorrect statement of the law as to elements of the offense." In the court's view, the lack of redeeming social importance "is not an element of the definition [of obscenity] itself" or "an essential element of obscenity" but merely "a consequence of obscenity * * *." (*id.* Vol. III, p. 535a). The court went on to instruct the jury that the definition of "obscenity" had but two elements, "predominant appeal to prurient interest" and "if it goes substantially beyond customary limits of candor in description or representation on such matters" (*id.* Vol. III, p. 560a). Petitioners thereafter objected to this instruction for failure to include, as "one of the essential ingredients of the concept of obscenity," that the material be "utterly without redeeming social importance." (*id.* Vol. III, p. 567a).

The district court's instructions were in keeping with the language of *Roth* v. *United States*, 354 U.S. 476, and the opinion of Mr. Justice Harlan in *Manual Enterprises* v. *Day*, 370 U.S. 478.[1] However, in *Memoirs* v. *Massachusetts*, 383 U.S. 413, decided after

[1] *Jacobellis* v. *Ohio*, 378 U.S. 184, was decided after the trial below.

the trial in this case and one day before the decision of court of appeals affirming the convictions, the Court reversed a holding of the Supreme Judicial Court of Massachusetts which had rejected the proposition "that a book which appeals to prurient interest and is patently offensive must [also] be unqualifiedly worthless before it can be deemed obscene." In an opinion announcing the judgment of the Court, in which the Chief Justice and Mr. Justice Fortas joined, Mr. Justice Brennan stated (338 U.S. at 419–420):

> The Supreme Judicial Court erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." A book cannot be proscribed unless it is found to be *utterly* without redeeming social value [emphasis in original]. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness. Hence, even on the view of the court below that *Memoirs* possessed only a modicum of social value, its judgment must be reversed as being founded on an erroneous interpretation of a federal constitutional standard.

It is clear that under this test, as further explicated in Part II of the opinion, an issue whether material has redeeming social value and was traded on the basis of that value is an important one in a prosecution of a defendant charged with the distribution of the material as obscenity. Viewed in conjunction with the opinions of the other members of the Court, these principles of

the plurality opinion would, we assume, govern any case prosecuted after the date of that decision.[2]

The opinion of the court of appeals, which was apparently written prior to the decision in *Memoirs* v. *Massachusetts* (although released on the day following), fails to consider the claim that the instructions to the jury were fatally defective under the standard enunciated in that case. Since this fundamental question has not been resolved by the court of appeals, we suggest that the appropriate disposition of the petition would be to remand the case to the court below for further consideration in the light of *Memoirs* v. *Massachusetts*.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966.

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[2] Under the rule articulated in *Ginzburg* v. *United States*, 383 U.S. 463, petitioners might have been found guilty, even had the jury found that the works themselves—viewed in the abstract—had redeeming importance, if the jury also found that the accused publications were "originated or sold as stock in trade of the sordid business of pandering * * *" (383 U.S. at 467). Such an instruction, however, was not given.

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